

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

DUANE BENNETT,	)	
	)	
Petitioner,	)	
	)	Case No. 13 CH 22884
v.	)	
	)	Hon. Sophia H. Hall
CITY OF CHICAGO POLICE BOARD	)	
AND THE SUPERINTENDENT OF	)	
POLICE, GARRY MCCARTHY,	)	
	)	
Respondents.	)	

**DECISION**

This case comes on before the Court on Petitioner Duane Bennett's Petition for Administrative Review of the Policy Board of the City of Chicago's decision that cause existed to discharge him from his position as a Sergeant with the Chicago Police Department.

On July 10, 2012, Bennett rendered a urine specimen that contained marijuana metabolites. He was charged with violating 3 of the Police Department's Rules of Conduct: (1) Violation of any law or ordinance; (2) any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department; and (3) disobedience of an order or directive, whether written or oral.

On August 15, 2013, the Board issued a Decision, determining that cause existed to discharge Bennett. Bennett challenges that decision, arguing it is against the manifest weight of the evidence and that the sanction of discharge is too harsh.

Evidence in the Record

The Superintendent called Dawn Hahn, laboratory operations manager for Quest Diagnostics, which handled Bennett's urine sample from July 10, 2012. Hahn testified that Bennett's sample, on an initial screening test, was positive for 50 ng/mL or more of marijuana metabolites. That is the City's cut-off for an initial "positive" result, prompting a second confirmation testing. The confirmation testing uses a gas chromatograph/mass spectrometer ("GCMS"), designed to more specifically identify the primary metabolite of marijuana, called THC acid. The GCMS test found that Bennett's sample contained 33 ng/mL of THC acid. The City's threshold for a positive confirmation test is 15 ng/mL.

On July 16, 2012, Bennett had a second urine test performed, which was negative for marijuana. On August 21, 2012, Bennett provided a hair sample, which tested negative for the presence of marijuana.

Bennett testified that he does not smoke marijuana and was shocked by the test results. He testified to four occasions where he was exposed to marijuana smoke prior to his drug test. First, on 2:30 or 3:00 a.m. on the day of the test, he smelled marijuana smoke in his son's basement room, directly below Bennett's room. He then unsuccessfully searched his son's room, about 10' by 12' by 6', ventilated by an air conditioner, for about 20 minutes. Second, on June 27, 2012, Bennett attended an outdoor concert for a couple of hours and several people around him were smoking marijuana. Third, in late June he responded to a call in a tire shop, where there was a strong smell of marijuana. He was in the back room of the shop, approximately 15' by 4' by 8', for about half an hour. Fourth, for 2-3 weeks prior to the drug test, he was assigned watch commander in the Fifth District, and his office was near a narcotic safe that emitted a strong smell of marijuana. The marijuana was sealed and was not burning.

Bennett called seven character witnesses. Bennett's wife, Jean Bennett, testified that she has known Bennett for 25 years and has never known him to use marijuana. Capt. Thomas McMahon described Bennett as "a good decision maker, excellent at critical thinking, had a great understanding of the general orders and job knowledge . . . excellent field supervisor . . . and exceptionally ethical and moralistic." Sgt. Richard Bednarek described Bennett as "a very model police officer and Sergeant." Sgt. Daniel Lockhart testified that Bennett has "a great reputation . . . he has the highest character." District Chief Patricia Ciara described Bennett as "very professional . . . does whatever is necessary . . . the best . . . ." Lt. Ronald Forgue described Bennett as "a guy you want beside you . . . absolutely he had integrity . . . ." Officer Brian Baader described Bennett as "one of the finest supervisors on the street."

#### *Expert Witnesses*

Bennett called Dr. James O'Donnell, who is board-certified in pharmacology and has testified frequently as an expert in court and administrative proceedings. Dr. O'Donnell opined that it was more likely true than not that Bennett's positive test result was due to environmental exposure. Dr. O'Donnell relied upon the amount of marijuana in Bennett's urine test, which he characterized as low, and the subsequent negative urine and hair tests. He testified that marijuana has a "half-life," which can produce positive test results up to 30 days after use. Dr. O'Donnell testified that the fact that the second urine test was negative made environmental exposure the more likely explanation.

Dr. O'Donnell referenced a 1986 article in formulating his opinion, entitled *Contact Highs and Urinary Cannabinoid Excretion After Passive Exposure to Marijuana Smoke*, Cone and Johnson, CLINICAL PHARMACOLOGY IN THERAPEUTICS (Sept. 1986). That article reported two

studies where people were exposed to marijuana smoke in an unventilated 8' x 6' x 8' room. In the first study, the test subjects were exposed to the smoke of four marijuana cigarettes for one hour a day, for six consecutive days. In the second study, the subjects were exposed to 16 marijuana cigarettes for one hour a day, for six consecutive days. The five test subjects thereafter tested positive for marijuana metabolites, the highest reported level being 75 ng/mL of all marijuana metabolites.

On cross-examination, Dr. O'Donnell acknowledged that the conditions in those studies were more extreme than any of the four scenarios Bennett described. Dr. O'Donnell also acknowledged that the experiments did not use GCMS testing to measure specific levels of THC acid in the test subjects' urine.

The Superintendent called Dr. Shirley Conibear as a rebuttal expert witness. Dr. Conibear is a licensed physician who works as a Medical Review Officer and is hired to review positive drug tests for the Police Department. Dr. Conibear is paid by the Chicago Police Department, and has testified about positive drug test results in other cases.

Dr. Conibear opined that exposure to secondhand smoke of burned marijuana can result in a test positive for marijuana. She further opined, however, that the level at which Bennett tested, 33 ng/mL of THC acid, could not have been through environmental exposure. Dr. Conibear testified that the exposures Bennett described were either too long prior to his July 10 drug test, or not of sufficient intensity to account for his results. Dr. Conibear further testified that Bennett's exposure to non-burning marijuana could not have resulted in absorption of THC acid.

Dr. Conibear testified that Bennett's subsequent negative urine and hair tests did not change her opinion. She testified that the July 16 urine test was too far removed from the July 10 test to be reliable, because, due to the "half-life" of marijuana metabolites, it could have been undetectable by the time the July 16 test was conducted. She explained that the amount of marijuana in a person's system reduces by half every 36 hours. Moreover, she testified the hair test was of limited use, because it was more likely to measure long-term marijuana use.

Dr. Conibear referenced a 1987 article by the same authors of the 1986 article Dr. O'Donnell referenced, entitled *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Levels of Delta 9 Tetrahydrocannabinol*, Cone, et al., JOURNAL OF ANALYTICAL TOXICOLOGY (May-June 1987). In that article, the researchers administered similar studies to those in the 1986 article, but unlike the studies described in the 1986 article, used GMCS testing to measure the level of THC acid in the test subjects' urine. Under a condition simulating four marijuana cigarettes in an unventilated room for one hour a day for six straight days, the highest level of THC acid detected in the test subjects' urine was 6 ng/mL. In the study simulating 16 marijuana cigarettes under those conditions, the highest level of THC acid detected was 87 ng/mL.

On cross-examination, Dr. Conibear acknowledged that environmental exposure to marijuana could result in a THC level of 33 ng/mL. She testified, however, that such exposure would need to be extreme and was highly unlikely to occur. She did acknowledge that the THC acid level in marijuana today is higher than it was in 1987, when those studies were conducted, although she did not know in precisely what amount.

### Board Decision

The Board found Bennett's environmental exposure defense "not credible" and Dr. O'Donnell's testimony in support "unconvincing." The Board found Dr. Conibear's testimony to be "convincing." The Board then considered Bennett's 22 years of service, complimentary history, and numerous awards. Notwithstanding, the Board determined that Bennett must be discharged for possessing and ingesting marijuana. The Board stated that use of illegal drugs by officers increases the risk that they will not have the physical stamina and psychological stability to perform their job. It also stated that use of illegal drugs increases the risk that the officer will become involved with a person or enterprise engaged in illegal drug activity.

## **ANALYSIS**

### **Standard of Review**

Review of the Board's decision to discharge Bennett is a two-step process. *Walsh v. Bd. of Fire and Police Comm'rs of the Village of Orland Park*, 96 Ill. 2d 101, 105 (1983). First, the Court must determine whether the Board's findings of fact are against the manifest weight of the evidence. *Id.* Under the manifest weight standard, the Court does not reweigh the evidence or make an independent determination of the facts. *Abrahamson v. Ill. Dept. of Prof'l Reg'n*, 153 Ill.2d 76, 88 (1992). Rather, the Court reviews the evidence of record and will only reverse the Board's decision "if the opposite conclusion is clearly evident." *Id.*

Second, the Court must determine if the Board's findings provide a sufficient basis for its decision that cause for discharge exists. *Walsh*, 96 Ill. 2d at 105. An administrative agency's disciplinary sanction for cause is entitled to deference, and will be overturned only if it is "arbitrary and unreasonable or unrelated to the requirements of service." *Id.* at 105-06.

### **I.**

#### **Review of the Board's Findings**

Bennett argues that the Board's determination was against the manifest weight of the evidence because it found its own "hired gun" expert, Dr. Conibear, to be more credible than Bennett's highly-qualified expert, Dr. O'Donnell. Bennett argues Dr. Conibear's testimony was impeached several times. First, Bennett argues that Dr. Conibear failed to account for the half-life

of marijuana metabolites. The Board points out, however, that Dr. Conibear supported her opinion with testimony that, because of marijuana's half-life, Bennett's reported exposures were unlikely to cause a positive, as three of the exposures were two weeks prior to the first test date.

Second, Bennett argues the 1987 study on which Dr. Conibear relied supports Bennett's position, because one of the subjects in that study tested at a higher level than Bennett did. The Board responds that, although one of the subjects in the 1987 study had a THC acid level of 87 ng/mL, higher than Bennett's 33 ng/mL, that person was in the 16-cigarette group. In the four-cigarette group, the maximum THC acid level was 6 ng/mL. The Board points out that even Dr. O'Donnell acknowledged that the four-cigarette condition was more extreme than the exposures which Bennett described. Furthermore, the Board points out that the 1986 study on which Dr. O'Donnell relied did not measure THC acid levels at all.

Third, Bennett argues that Dr. Conibear admitted she never interviewed Bennett. The Board responds that Bennett did not point to any legal requirement obligating Dr. Conibear to do so. Bennett has only cited to Department of Transportation regulations, which do not bind the Chicago Police Department. In any event, Dr. Conibear did review the Bureau of Internal Affairs' interview with Bennett.

Fourth, Bennett argues Dr. Conibear did not consider Bennett's exposure to marijuana that was not burning. The Board responds that Dr. Conibear did specifically consider it, but testified that such exposure would not result in THC acid absorption.

Finally, Bennett argues that Dr. Conibear had not considered the negative hair sample, prior to opining about it at the hearing. The Board responds that Dr. Conibear did testify that she considered Bennett's negative hair test, but did not consider it conclusive because it was taken over a month after the first sample, and only showed he was not a long-term marijuana user.

This Court finds that the Board's decision to accept Dr. Conibear's opinion, instead of Dr. O'Donnell's, is not against the manifest weight of the evidence. This case presented the Board with competing expert opinions on whether Bennett's positive marijuana test result was likely to have been from environmental exposure. Dr. O'Donnell testified that, in forming his opinion, he relied upon the 1986 study. Upon cross-examination, however, Dr. O'Donnell acknowledged that that study did not use GMCS testing to measure THC acid levels, a test that was used in the 1987 article relied on by Dr. Conibear.

Dr. Conibear compared the results of the 1987 study with Bennett's level, which was higher, but with less reported environmental exposure. That led her to conclude that Bennett's positive result was not due solely to environmental exposure. Dr. Conibear did acknowledge that levels of THC acid in marijuana produced today may be higher than they were in 1987, but she did not know

in what amount. No party introduced further evidence on this point. The Court also finds that Dr. Conibear was not otherwise “impeached,” as Bennett argues.

## II. Decision to Discharge

The Board must have “just cause” to support discharging Bennett. *Walsh*, 96 Ill. 2d at 105-06. The Board’s finding that cause for discharge exists is entitled to deference, but will be overturned if “it is arbitrary and unreasonable or unrelated to the requirements of service.” *Id.* The Court may not consider whether it would have imposed a more lenient sanction, were it to have initially weighed the evidence to decide which discipline would be appropriate. *Id.* Rather, the Court is confined to review of the Board’s sanction under the arbitrary and unreasonable standard. *Id.*

Bennett argues that the Board’s decision to discharge him was arbitrary and unreasonable under the totality of the circumstances. Bennett points to his impeccable record of service with the Chicago Police Department, and the fact that he had never been disciplined in 22 years of service. He further points to the seven character witnesses who testified to his exemplary character. He argues that the Board erred by not considering this extraordinary mitigation evidence, which demonstrates that Bennett was not detrimental to the police force. Bennett also argues the Board should have considered his subsequent negative test results, after the initial positive result.

The Board argues that the decision to discharge Bennett was not arbitrary or unreasonable. The Board argues that police officers have a duty to follow the laws that they enforce. “[A] police officer who does not abide by the laws that he has a duty to enforce will impair the discipline and efficiency of the police force.” *Jones v. Civil Serv. Comm’n of Alton*, 80 Ill. App. 3d 74, 76 (1st Dist. 1979).

This Court finds that the Board’s decision to discharge Bennett, after finding that he tested positive for marijuana, and that it was not likely due to environmental exposure, was not “arbitrary and unreasonable.” Although Bennett otherwise had an exemplary service record as a police officer, this Court may not substitute its judgment for that of the Board. It was not unreasonable for the Board to find that a police officer who did not follow a law he is charged with enforcing is inherently detrimental to the force.

Entered: \_\_\_\_\_

Date: \_\_\_\_\_

